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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 290

ONE, INCORPORATED, a corporation,

Appellant,

vs.

OTTO K. OLESEN, individually and as Postmaster of the City of Los Angeles,

Appellee.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

ONE, INCORPORATED, Petitioner,
By ERIC JULBER,
6505 Wilshire Boulevard,
Los Angeles 48, California,
Counsel for Petitioner.

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OTTO K. OLESEN, individually and as Postmaster of the City of Los Angeles,

Appellee.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable the Chief Justice and the Associated Justices of the Supreme Court of the United States:

Your petitioner, One, Incorporated, a non-profit corporation duly organized under the laws of the State of California, respectfully prays that a writ of certiorari be issued out of and under the Seal of this Court to review the decision of the United States Court of Appeals for the Ninth Circuit, rendered on February 27, 1957, which sustained a judgment of the United States District Court for the Southern District of California, Central Division, rendering judgment against the plaintiff, and dismissing the plaintiff's complaint, on the merits.

Jurisdiction.

Jurisdiction to review this case upon writ of certiorari is conferred upon this Court by 28 U. S. C. A., Section 1254(1). Jurisdiction of the District Court was conferred by 39 U. S. C. A., Section 259(a); 28 U. S. C. A., Sections 1339, 2201, and 2202; 5 U. S. C. A., Section 1001, *et seq.*; and Articles I, IV, V, VI, VII, and VIII of Amendments to the Constitution of the United States.

The opinion of the Court of Appeals for the Ninth Circuit was filed February 27, 1957; it is reported at 241 F. 2d 772, and is printed in the Record; petition for rehearing was filed March 14, 1957, and denied April 12, 1957.

Questions Presented.

The questions presented by this petition are:

1. Is the October, 1954, issue of "One" lewd, lascivious, obscene or filthy, and therefore "non-mailable" matter under the provisions of 18 U. S. C. A. 1461?

2. Have the Postmaster and the Courts below correctly gauged the "moral tone of the community" in declaring the appellant's publication to be "non-mailable," or have they applied a stricter standard to the appellant's publication to that applied to other publishers and magazines, thus depriving appellant of equal protection of the laws and due process of law?

3. Is the governing statute, 18 U. S. C. A., Section 1461, to be construed and enforced *literally*, in so far as it purports to declare as "non-mailable" *every* "advertisement . . . where or how or from whom . . . such mentioned matters . . . may be obtained," or is a publisher permitted the defense of "good faith" if he in fact has no knowledge of the obscene character of matter furnished to a reader by an advertiser subsequent to the appearance of an advertisement?

4. Assuming that the statute must in fact be applied *literally* with respect to advertisements, has the Postmaster deprived appellant of equal protection of the laws by failing to enforce such a literal construction against any other publisher except appellant?

Statute Involved.

Pertinent provisions of 18 U. S. C. A., Section 1461, are set forth in the appendix.

Statement.

Plaintiff and appellant, One, Incorporated, is a nonprofit corporation organized under the laws of the State of California, and engaged in the business of printing and distributing a monthly magazine entitled "One." On or about October 1, 1954, plaintiff deposited in the United States mails for transmission to various parts of the United States, several hundred copies of the October, 1954 issue of said magazine. On or about October 20, 1954, plaintiff was notified by Otto K. Olesen, Postmaster of the City of Los Angeles, that all of the copies so deposited were being withheld from dispatch, because he considered them to be "obscene, lewd, lascivious and filthy" under the provisions of 18 U. S. C. A. 1461. The defendant, Otto K. Olesen, has returned said issues to the plaintiff and has refused and continues to refuse to dispatch them through the mails.

On September 16, 1955, the appellant instituted this action by filing a complaint against the defendant in the United States District Court for the Southern District of California. The complaint alleged that the defendant had wrongfully refused to accept the October, 1954 issue of "One" for mailing, because the said magazine is not obscene, lewd, lascivious or filthy within the meaning of the statute, but was, on the contrary, informative and an exercise of privileged free speech and communication. The complaint prayed for judgment declaring the October,

1954 issue of "One" lawful and mailable, and enjoining the defendant from failing or refusing to dispatch same in the regular course of mail.

On November 11, 1955, the defendant filed an answer to the complaint. The answer admitted that the defendant had refused to accept the October, 1954 issue of "One" for mailing, and alleged that it cannot be accepted for mailing because it is non-mailable matter under the provisions of 18 U. S. C. A. 1461.

On January 16, 1956, the case came on for trial setting before the Honorable Thurmond Clarke, District Judge. At that time the parties agreed that the case could be decided and a final judgment rendered, on the basis of motions for summary judgment. At that time, both plaintiff and defendant moved for summary judgment, and the Court took the case under submission on written briefs and affidavits. On April 3, 1956, the Court entered judgment against the plaintiff. On April 16, 1956, the plaintiff filed a notice of appeal from the judgment, and said appeal was subsequently perfected, briefs filed, and the cause argued and submitted to the United States Court of Appeals for the Ninth Circuit.

On February 27, 1957, the United States Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court, in an opinion written by District Judge Ross.

On April 12, 1957, the United States Court of Appeals for the Ninth Circuit denied appellant's motion for rehearing.

Specification of Errors to Be Urged.

The Court of Appeals erred as follows:

1. On the first question, by ruling that the magazine is "obscene, lewd, lascivious and filthy."

2. On the second question,

(a) By incorrectly gauging the "moral tone of the community,"

(b) By disregarding and failing to consider or discuss a lengthy appendix, furnished to the Court by the appellant, containing extracts and quotations from books and magazines currently freely circulating in the public mails and found and sold in public libraries, newsstands, drug stores, etc., all over the United States, which appellant appended to its briefs in an attempt to show to the Court of Appeals the prevailing "moral tone of the community," and

(c) By refusing to consider, or to discuss, the appellant's claim that since other publications and books are permitted to deal with the same subject matter, in even more explicit fashion, without any action being taken by the Postmaster or any authority to interfere with their mailing privileges, that therefore the appellant has been singled out and discriminated against and made the subject of a unique and strict application of the statute, thus denying to it equal protection of the laws and due process of law.

3. By assuming without argument, and without consideration of appellant's authorities to the contrary, that the statute, 18 U. S. C. A. 1461, must be interpreted literally as applied to advertisements appearing in a magazine, and by refusing to consider or discuss the defense raised by the appellant of "good faith."

4. By failing to consider appellant's argument, supported by extracts of testimony of the Postmaster before a Congressional Committee, that the Postmaster has never applied such a literal construction, if one is even proper, against any other publisher except the appellant, with regard to advertistements accepted by the publisher in good faith.

REASONS RELIED ON FOR GRANTING THE WRIT.

I.

The Court Below Has Decided Important Questions of Federal Law Which Have Not Been, but Should Be, Settled by This Court.

There are no decisions of this Court, or, in fact, of any Court of Appeals, which deal with the matter of the depiction of homosexuality in literature, and the bounds and extent of the permissible depiction and discussion. The lower Court has repeatedly begged the question by assuming, without argument, discussion or any explanation of any kind whatsoever, that the mere depiction of homosexuals or homosexual problems in literature is "lustful" or "stimulating" in such a manner as to render the literary work "obscene." Decisions of other Circuit Courts, for example, *Parmellee v. U. S.*, 113 F. 2d 729, have held that a discussion, and even advocacy, of nudism, if done in a responsible manner, actually serves the interests of "society" and should be tolerated. However, the question of the depiction or consideration of the problems raised by homosexuality among our population has never been considered by this Court or any Court of Appeals, and the instant decision of the Ninth Circuit Court of Appeals represents a grave restriction of the right of free discussion and expression in literature.

II.

The Decision Below Is in Conflict With Decisions of Other Courts of Appeals.

The decisions of other Courts of Appeals in such cases as *Parmellee*, cited above, *U. S. v. Dennet*, 39 F. 2d 564; *U. S. v. One Book Called Ulysses*, 72 F. 2d 205; *Walker v. Popenoe*, 149 F. 2d 511, and *Consumers Union v. Walker*, 145 F. 2d 33, while none of them deal explicitly

with the subject of homosexuality, nevertheless permit and encourage a freer discussion of human and social problems than does the repressive and restrictive view now taken by the Ninth Circuit Court of Appeals.

III.

The Court Below Has Decided a Federal Question of Law in Conflict With the Applicable Decisions of This Court, and of Other Courts, and Has Departed so Far From the Accepted and Usual Course of Judical Proceedings as to Call for an Exercise of This Court's Power of Supervision.

Appellant contends that the Court below failed to consider the book *as a whole*. It is fundamental law that "the book as a whole must be considered, not isolated passages. It is the *dominant* tone which controls." (*U. S. v. One Book Called Ulysses*, 72 F. 2d 705; *Walker v. Popenoe*, 149 F. 2d 511, *Parmellee v. U. S., supra.*) The opinion of the Court of Appeals for the Ninth Circuit clearly shows that the Court did not consider at all lengthy portions of appellant's publication which were obviously informative, instructive, and serious in tone.

The Court below failed to consider the intent of the publisher and author. "The intent of the author and his sincerity and honesty are relevant." (*U. S. v. One Book Called Ulysses*, 5 F. 2d 182; *Parmellee v. U. S., supra, U. S. v. Dennet*, 39 F. 2d 564.)

> "The standard must be the likelihood that the work will so much arouse the salacity of the reader to whom it is sent as to outweigh any literary, scientific or other merits it may have in that reader's hands." (*U. S. v. Levine*, 83 F. 2d 156.)

The cases are clear that the subjective test of the obscenity of the matter is its effect on the *average* reader,

not the exceptional reader. (*U. S. v. One Book Called Ulysses, supra; U. S. v. Kenerrly,* 209 Fed. 119; *U. S. v. Nusgrave,* 160 Fed. 700; *Walker v. Popenoe, supra; U. S. v. Bernstein,* 178 F. 2d 665.)

Works which attempt to elucidate, explain or grapple with thorny and fundamental human problems should be extended great latitude of expression, since they often, in the last analysis, serve humanity's ends. For example, see *Parmellee v. U. S. supra,* in which the Court extends great tolerance to the exponents and advocates of nudism as a way of life. See also *U. S. v. Barlow,* 56 Fed. Supp. 795, in which the District Court holds that a publication advocating *polygamy* as a way of life, while it may be distasteful and disgusting to the average reader, is nonetheless not *obscene* within the meaning of the statute.

The last two cited cases are, in appellant's opinion, extremely important in the consideration of this problem. Where mere commercial exploitation, or pandering for profit, are concerned, the courts need not take such infinite care in the weighing of what is "obscene." But in the *Parmellee* and *Barlow* cases, and, appellant respectfully submits, in the case now under consideration, the works held to be "obscene" are works dealing with and attempting to explain to the layman problems of human life that have plagued the human race through the centuries. Such an attempt to cope with a fundamental human problem should be extended every legal latitude and should be weighed with more care than that devoted by the District Court or the Court of Appeals for the Ninth Circuit in the instant case.

Appellant would also respectfully submit that there is nowhere in the instant issue, or in any issue, of "One" magazine, any *advocacy* of homosexuality as a way of life, but only a discussion of the problems, social, economic, and personal, which confront those persons possessed of that particular neurosis, or complexion.

It is respectfully submitted by the appellant that the case of One, Incorporated, vs. Olesen presents a proper, fitting, and compelling occasion for the exercise of the learned and distinguished supervisory power of this Court.

ONE, INCORPORATED, Petitioner,

By ERIC JULBER,

Counsel for Petitioner.

Date: June 13, 1957.

APPENDIX.

"Every obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print or other publication of an indecent character; and . . .

"Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made. . . .

"Is declared to be non-mailable matter and shall not be conveyed in the mails or delivered from any Post Office or by any letter carrier. . . ."—18 U. S. C. A., Section 1461.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Argument	3
Conclusion	5

CITATIONS

Cases:

Roth v. *United States*, No. 582, Oct. T., 1956	4, 5
United States v. *Levine*, 83 F. 2d 156	4

Statute:

18 U. S. C. 1461	2, 3

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 290

ONE, INCORPORATED, A CORPORATION, PETITIONER

v.

OTTO K. OLESEN, INDIVIDUALLY AND AS POSTMASTER OF THE CITY OF LOS ANGELES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the United States District Court for the Southern District of California, Central Division (R. 31–34), are not reported. The opinion of the United States Court of Appeals for the Ninth Circuit (R. 47–57) is reported at 241 F. 2d 772.

JURISDICTION

The judgment of the Court of Appeals was entered on February 27, 1957 (R. 47). A petition for rehearing, timely filed, was denied on April 12, 1957 (R. 59). On June 10, 1957, the time within which

to file a petition for a writ of certiorari was extended by Mr. Justice Douglas to July 26, 1957. The petition for a writ of certiorari was filed on July 18, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the October 1954 issue of "One, The Homosexual Magazine," is obscene and therefore nonmailable under 18 U. S. C. 1461.

STATUTE INVOLVED

18 U. S. C. 1461 provides in pertinent part as follows:

> Every obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character; * * *
>
> * * * * * *
>
> Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.
>
> * * * * * *

STATEMENT

In October 1954, petitioner delivered for mailing approximately 600 copies of the October 1954 issue of "One" to the United States Post Office at Los Angeles, California (R. 3, 37). Respondent, Postmaster of Los Angeles, refused to dispatch these magazines through the mails and notified petitioner that this action was taken because the magazines were nonmailable under 18 U. S. C. 1461 (R. 37). Subsequently, these copies of "One" were returned to petitioner (R. 37).

On September 16, 1955, petitioner filed its complaint in the District Court for the Southern District of California seeking to enjoin the postmaster from continuing to refuse to accept for mailing the October 1954 issue of "One" (R. 2–5). After an answer was filed on behalf of respondent, the case came on for trial setting (R. 38). The parties then stipulated that the only question involved was whether this particular issue of "One" was nonmailable under 18 U. S. C. 1461, *supra* (R. 38). Upon consideration of the pleadings and motions and affidavits filed by the parties, the District Court resolved the stipulated issue in respondent's favor (R. 31–35).

On appeal, the court below reexamined the issue which had been stipulated as the only one in the case, and affirmed the judgment of the District Court (241 F. 2d 772, R. 47–57). It discussed *in extenso* the material found by the District Court to be obscene (241 F. 2d at 777–8, R. 54–55) and, on the basis of this examination, held: "It is apparent that the magazine is obscene and filthy and therefore nonmailable matter" (241 F. 2d at 777, R. 53). A petition for rehearing was denied (R. 59).

ARGUMENT

The sole issue raised by this case, stipulated by the parties in the District Court, is whether the October 1954 issue of "One" is nonmailable under 18 U. S. C. 1461, *supra*, p. 2. No question of procedure is raised, and no issue of constitutionality. The single question before the Court is essentially one of fact and was decided adversely to petitioner

in both courts below. In reaching their conclusions, these courts utilized the legal standards recently reaffirmed by this Court in *Roth* v. *United States*, No. 582, Oct. T., 1956.

The terms of statutes, such as 18 U. S. C. 1461, which seek to define and reach obscene and filthy matter have been recognized as necessarily lacking precision. *Roth* v. *United States, supra,* slip op., p. 13. Such statutes do not, however, fail for this reason. The inquiry to be made is not solved by the application of a mathematical formula or by the use of a slide rule. *Roth* v. *United States, supra,* slip op., pp. 13–14; *United States* v. *Levine,* 83 F. 2d 156, 157 (C. A. 2). On the contrary, the trier of fact must determine "* * * whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." *Roth* v. *United States, supra,* slip op., p. 11.

The method of decision employed by the court below in this case fully satisfies the "dominant theme" test reaffirmed in *Roth*. The court specifically recognized the need to consider the magazine as a whole so as to determine its basic or primary purpose (241 F. 2d at 778, R. 55–56), and it did so. It entered upon the same inquiry as that made by the district judge, examining in detail certain stories, a poem, an advertisement, and the material thus advertised (R. 33; 241 F. 2d at 777–8, R. 53–55). The court thereupon concluded (241 F. 2d at 778, R. 56):

> * * * The magazine under consideration, by reason of the articles referred to, has a pri-

mary purpose of exciting lust, lewd and lascivious thoughts and sensual desires in the minds of the persons reading it. Moreover, such articles are morally depraving and debasing. The articles mentioned are sufficient to label the magazine as a whole, obscene and filthy.

There is no need for this Court to review these findings.[1]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be denied.

J. LEE RANKIN,
Solictor General.
GEO. S. LEONARD,
Acting Assistant Attorney General.
SAMUEL D. SLADE,
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Attorneys.

AUGUST 1957.

[1] The courts below did not find the magazine non-mailable simply because it deals with the subject of homosexuality. As the Court of Appeals noted (241 F. 2d at 777, R. 53), the publisher opens the magazine with the statement that it proposes to deal "with homosexuality from the scientific, historical and critical point of view", but the actual contents of the issue do not bear out that pronouncement. On the contrary, the material in the magazine appears primarily to deal with sex—openly and covertly, by drawings and words—"in a manner appealing to [the] prurient interest" of those the magazine tries to reach. *Roth* v. *United States*, *supra*, slip op., p. 9. The emphasis is, in the main, not on the philosophical, scientific, or educational.

U. S. GOVERNMENT PRINTING OFFICE: 1957